

Paul Arons, State Bar #84970  
Sharon Grace, State Bar #83527  
LAW OFFICE OF PAUL ARONS  
685 Spring Street, #104  
Friday Harbor, WA 98250  
Tel: (360) 378-6496  
Fax: (360) 378-6498  
lopa@rockisland.com

Deepak Gupta (*pro hac vice*)  
PUBLIC CITIZEN LITIGATION GROUP  
1600 20th Street, NW  
Washington, DC 20009  
Tel: (202) 588-1000

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ELENA DEL CAMPO, et al. on behalf of  
themselves and all others similarly  
situated,  
  
Plaintiffs,  
  
v.  
  
AMERICAN CORRECTIVE COUNSELING  
SERVICES, INC., et al.,  
  
Defendants.

Civ. No. C01-21151 JW

CLASS ACTION

PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION; SUPPORTING  
MEMORANDUM

Date: July 7, 2008  
Time: 9:00 a.m.  
Courtroom 8

AND CONSOLIDATED ACTION

Civ No. C03-2611 JW

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1 To all parties and their attorneys of record: Named plaintiffs Elena del Campo, Ashorina  
 2 Medina, Lisa Johnston and Lois Artz will move the Court for class certification on July 7, 2008  
 3 at 9:00 a.m., in Courtroom 8 of the United States District Court, San Jose Division, located at  
 4 280 S. First St., San Jose, CA.

5 Plaintiffs request the Court to certify this lawsuit to proceed as a hybrid class action  
 6 pursuant to Fed.R.Civ.P., Rules 23(b)(2) and 23(b)(3), with the issues of declaratory and  
 7 injunctive relief, liability and statutory damages certified under Rule 23(b)(2), and the issue of  
 8 actual damages certified under Rule 23(b)(3).

### 9 INTRODUCTION

10 This is a putative class action challenging the debt-collection practices of American  
 11 Corrective Counseling Services, Inc. (ACCS) in connection with its operation of proprietary  
 12 "Bad Check Diversion Programs." The suit is brought under the Fair Debt Collection Practices  
 13 Act (FDCPA), the California Unfair Business Practices Act, the common law, and the right to  
 14 privacy under the California Constitution. ACCS, a private corporation, contracts with over two  
 15 dozen district attorneys (DA's) throughout California, to operate check collection programs. In  
 16 its debt collection conduct ACCS operates much the same as any other debt collector, except that  
 17 ACCS uses the authority of the district attorneys as a hammer. It is ACCS' conduct of its  
 18 collection programs that has generated this litigation. California criminalizes writing checks  
 19 "willfully, with intent to defraud" and with knowledge that insufficient funds are available. Cal.  
 20 Penal Code § 476a(a). The California legislature has authorized district attorneys to create bad  
 21 check diversion programs that "may be conducted by the [DA] or by a private entity under  
 22 contract." Cal. Penal Code §§ 1001.60-1001.67, §1001.60. ACCS business is the promotion and  
 23 operation of these programs, and its income comes from the fees it charges check writers. ACCS  
 24 terms its collection operation a "check restitution" program and shares a small portion of the fees  
 25 it collects with the DA in each county in which it contracts.

26 Once the DA approves the ACCS' form letters, check intake criteria and prosecution  
 27 review criteria, ACCS runs virtually every aspect of the check program. —Major merchants, such  
 28

1 as Target and Safeway, and other debt collectors send ACCS batches of unpaid checks for  
2 collection. ACCS inputs the data and generates standard form letters sent to check writers.

3 ACCS collects checks aggressively and markets its program as having the “DA Brand.”  
4 When Elena del Campo wrote a \$95.02 check that did not clear, ACCS sent her a letter entitled  
5 “Official Notice,” on the Santa Clara County DA's letterhead, purporting to be from the DA's  
6 office, warning that his office had received "an INCIDENT REPORT *alleging that you have*  
7 *violated Penal Code 476(a) of the California State Statute: Passing a Worthless Check.*"  
8 *Emphasis in original.* It claimed that "YOU MAY AVOID A COURT APPEARANCE if you agree  
9 to enroll [in the bad check program]" (*emphasis in original*) and demanded, after adding in  
10 ACCS' various fees, \$265.02 in payment. Letters and scripted phone calls continue until ACCS  
11 obtains full payment, or terminates its collection effort. For many DA's, after collection efforts  
12 have been exhausted, ACCS reviews the check to determine if the check meets narrowly defined  
13 criteria for sending the check writer's file to the prosecutor. During this process, ACCS may  
14 request the check writer's bank records purportedly pursuant to Cal. Gov. Code § 7480(b).<sup>1</sup>

15 Four courts that have considered the question of class certification in cases against ACCS  
16 and similar “check diversion” companies—cases that are materially indistinguishable from this  
17 one—have held that class certification is appropriate. *See Hamilton v. American Corrective*  
18 *Counseling Services, Inc.*, 2007 WL 541817 (N.D. Ind. 2007); *See Schwarm v. Craighead*, 233  
19 F.R.D. 655 (E.D. Cal. 2006); *Liles v. American Corrective Counseling Services, Inc.*, 231 F.R.D.

20  
21  
22 1. Gov. Code § 7480(b) provides in relevant part that certain financial records shall be  
furnished:

23 When any *police or sheriff's department or district attorney in this state*  
24 *certifies* to a bank, credit union, or savings association in writing that a crime report  
25 has been filed that involves the alleged fraudulent use of drafts, checks, access cards,  
26 or other orders drawn upon any bank, credit union, or savings association in this  
27 state, the *police or sheriff's department or district attorney may request* a bank, credit  
28 union, or savings association to furnish, and a bank, credit union, or savings  
association shall furnish, a statement setting forth the following information with  
respect to a customer account specified by the police or sheriff's department or  
district attorney for a period 30 days prior to, and up to 30 days following, the date of  
occurrence of the alleged illegal act involving the account: . . . *Emphasis added.*

565 (S.D. Iowa 2005) ; *Gradisher v. Check Enforcement Unit, Inc.*, 203 F.R.D. 271 (W.D. Mich. 2001)<sup>2</sup>

### ISSUES TO BE DECIDED

Whether the Court should grant hybrid class certification under Fed.R.Civ.P., Rule 23(b)(2) on the issues of declaratory and injunctive relief, liability, and statutory damages, and certify the issue of actual damages under Fed.R.Civ.P., Rule 23(b)(3).

### FACTS

#### A. Facts Relating to Defendants

ACCS' promotes and operates a check restitution programs in states throughout the country, including California. It uses standardized demand letters and uniform operating procedures. In California ACCS' letters are printed on district attorney letterhead, and ACCS seeks the same categories of fees from check writers. In its letters, ACCS states that the check writer's two basic options are to "participate" in the program, or face prosecution. None of the letters contain language mandated by the Fair Debt Collection Practices Act, 15 U.S.C. §§1692e(11) and 1692g. *See* Exhibits 1 through 15 to this motion, the letters sent to named plaintiffs, and Exhibit 16-A through 16-C, a collection of initial notices produced by ACCS in this action.

In its initial "Official Notice," ACCS demands the check amount, a \$35.00 "admin fee", a "program fee" ranging from \$75.00 to \$175.00 depending on the jurisdiction and time period when the letter was sent, and a "returned item" fee of \$10.00.<sup>3</sup> *See for example*, Exhibits 1, 6, 9, and 15.<sup>4</sup> Each initial "Official Notice" warns that a report has been made accusing the recipient

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2. In *Schwarm*, where the debt collector operated a restitution program very similar to the ACCS program, the court recently granted partial summary judgment against the defendant. *Schwarm v. Craighead*, \_\_\_ F.Supp.2d \_\_\_, 2008 U.S. Dist. LEXIS 36622, 2008 WL 1970341 (E.D.Cal. May 2, 2008).

3. Starting in 2007, bank fees were no longer requested in some counties.

3. The Exhibits to the Amended Consolidated Complaint ["Cons. Cmplt."] accompany this motion with the same exhibit numbers for the Court's convenience.

1 of violating Penal Code §476a, passing a worthless check, and threatens the recipient with court  
2 proceedings, and a criminal record, unless the check writer pays the check amount, all fees, and  
3 attends the ACCS class. If the recipient fails to accede to pay, ACCS sends follow up letters  
4 stating the unless the check writer complies the DA will file a “report” in municipal court  
5 (Exhibit 2), or pursue criminal prosecution (Exhibit 3, 7, 8 and 10), or arrest and prosecution  
6 (Exhibit 5 and 13); or that the DA is now initiating prosecution proceedings against the recipient  
7 (Exhibit 14.) None of ACCS’ letters advise the recipient that the letter is from a debt collector  
8 who is attempting to collect a debt. ACCS follows up its letter by having ACCS’ collectors  
9 begin calling the check writer. Exhibit 18, ACCS Operational Flow Chart. If the check fits  
10 within prosecution criteria, ACCS requests the check writer’s bank records. *See* Exhibit 19,  
11 ACCS “REQUEST FOR INFORMATION” form letter, requesting plaintiff Elena del Campo’s  
12 bank records; ACCS Response to del Campo Interrogatory No. 19, dated 3/17/08;<sup>5</sup> and Exhibit  
13 18, ACCS Operational Flow Chart.

14 According to ACCS, defendants attempted to collect 909,646 checks written in California  
15 from 1998 through 2007. Exhibit 17, ACCS Response to del Campo Interrogatory No. 31.  
16 During the same period California check writers paid more than the face amount of 340,768 of  
17 these checks, while 288,755 people paid the class fee that defendants demanded on these checks.  
18 *Id.*, ACCS Response to del Campo Interrogatory Nos. 32 and 33.

19 Plaintiffs allege that defendant Don R. Mealing was employed as the president of ACCS  
20 through November 2004. Amended Consolidated Complaint, filed 12/22/06 (Cons. Cmplt.), ¶ 5.  
21 He founded and controlled ACCS and actively participated in the operations of ACCS. *Id.*  
22 Mealing created ACCS to operate bad check restitution programs in California and throughout  
23 the United States; and that he designed, developed, and implemented the bad ACCS check  
24 restitution program. *Id.* Mealing, acting in concert with defendant Lynn R. Hasney, created the  
25 other corporate defendants in this action in furtherance of ACCS’ check restitution business. *Id.*

26  
27 5. The relevant ACCS’ interrogatory answers accompany this motion as Exhibit 17.  
28

Mealing and defendant Lynn R. Hasney have had ultimate authority to adopt, approve and modify the business practices of the corporate defendants. *Id.* Defendant Lynn R. Hasney is or was employed by ACCS as executive vice president of operations, and that she actively participated in the operations of ACCS through November 2004. *Id.* ¶ 6. Each of the other corporate or partnership defendants—Inc. Fundamentals, Fundamental Performance Strategies, Fulfillment Unlimited, Inc., and ACCS Administration—are owned and controlled by defendants Mealing and/or Hasney with their principal place of business located in San Clemente, California. *Id.* ¶ 7. These entities are alter egos of defendants Hasney or Mealing, and were engaged in the operation of the collection business at issue in this lawsuit. *Id.* ¶¶ 8-10.<sup>6</sup>

#### **B. Facts Relating to Plaintiffs**

The plaintiffs allege that Elena del Campo, Ashorina Medina, Lisa Johnston and Lois Artz each wrote at least one check for personal, family or household purposes, that was dishonored, and ACCS mailed each of them dunning letters on district attorney letterhead that demanded the check amount, a \$35.00 “admin fee,” a \$10.00 “returned item fee,” a “program fee” ranging from \$125.00 to \$140.00. Cons. Cmplt. ¶¶ 28, 37-38, 43, 54, 63-64; Exhibits 1, 11 and 15. ACCS’ demand letters threatened each plaintiff with criminal prosecution, court appearances, and criminal records, among other things, if they failed to accede to ACCS’ demands. The initial letter failed to advise plaintiffs of their rights under the FDCPA, and none of the letters advised plaintiffs that ACCS is a debt collector attempting to collect a debt and that any information obtained will be used for that purpose.

As alleged in the Consolidated Complaint, in response to the ACCS letters she received in 2001, plaintiff del Campo mailed payment for the check amount only, which ACCS accepted as a partial payment. Cons. Cmplt. ¶31. ACCS remitted half of del Campo’s payment to the merchant and applied half to its own fees. *Id.* ¶32. Ashorina Medina paid \$210 to ACCS, which ACCS accepted as partial payment, and remitted half to the merchant and applied half to its own

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6. With the exception of Inc. Fundamentals, these business entities ceased to exist after defendants Hasney and Mealing sold ACCS to new owners in November, 2004.

1 fees. *Id.* ¶ 46-47. Lisa Johnston made a series of partial payments which ACCS applied half to  
 2 its own fees and remitted half to the merchant. *Id.* ¶¶ 56-58. Lois Artz paid ACCS the check  
 3 amount, plus all fees ACCS demanded, and completed the financial management course. *Id.* ¶¶  
 4 65-67.

### 5 **C. Facts Common to Putative Class Members**

6 ACCS has mailed or will have mailed each putative class member at least one form  
 7 dunning letter printed on district attorney letterhead that is the same as or substantially similar to  
 8 the letters ACCS mailed to named plaintiffs. In its first letter, entitled “Official Notice” ACCS  
 9 has demanded or will demand payment of a dishonored check, plus a “program fee,” an “admin  
 10 fee,” and a “returned item fee.”<sup>7</sup> ACCS also has a standard practice of imposing other fees,  
 11 including, but not limited to, fees for permitting the class member to make payments, for paying  
 12 late, or for failure to attend class when scheduled. ACCS’ letters state that paying its fees, and  
 13 attending its diversion class, is the way to avoid criminal prosecution ACCS’ letters do not  
 14 advise each class member that ACCS is a debt collector seeking to collect a debt, and that all  
 15 information obtained will be used for that purpose. ACCS’ letters have failed or, unless  
 16 modified, will fail to advise class members of their rights under the FDCPA. Hundreds of  
 17 thousands of class members have paid or will pay fees that plaintiffs have alleged are unlawful  
 18 Thus, each potential class member has been or will be the victim of ACCS’ alleged federal  
 19 FDCPA violations, state unlawful business practices under Cal. Bus. & Prof. Code sections  
 20 17200 et seq., and may be victims of defendants’ negligent or fraudulent representations. By  
 21 obtaining the class member’s private banking information unlawfully, ACCS violates the class  
 22 members’ state constitutional right to privacy.

## 23 **STATUTORY FRAMEWORK**

### 24 **A. The Federal Fair Debt Collection Practices Act, 15 U.S.C. §§1692 et seq.**

25 Congress enacted the FDCPA, in part, "to eliminate abusive debt collection practices by  
 26 \_\_\_\_\_

27 <sup>7</sup> ACCS revised its letters in 2007. It appears that in some counties, the “Official Notice”  
 28 no longer includes a returned item fee. *See* Exhibit 16.

debt collectors." 15 U.S.C. § 1692(e). The Act applies to protect consumers from unscrupulous collectors, whether or not there is a valid debt. *Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982). If a consumer establishes one violation, there is liability under the FDCPA. *Cacace v. Lucas*, 775 F.Supp. 502, 505 (D.Conn. 1990). Specifically in relation to this case, the FDCPA prohibits debt collectors from making false representations in their collection demands, prohibits collecting charges in excess of the face amount of the check, in the absence of express contractual or statutory authorization, and requires certain warnings or advisements of rights in dunning letters. 15 U.S.C. §§ 1692e, f and g. In the absence of agreement, whether charges are permissible within the meaning of the FDCPA turns on state law. *Newman v. Checkrite, California Inc.*, 912 F.Supp. 1354, 1367 (E.D.Cal. 1995).

**B. California's Unlawful Business Practices Act, Bus. & Prof. Code §§17200 et seq.**

The California Unlawful Business Practices Act prohibits unfair competition. Bus. & Prof. Code §§ 17200 et seq. Unfair competition encompasses "unlawful business practices," which includes anything that can properly be called a business practice and at the same time is forbidden by law. *Barquis v. Merchants Collection Ass'n of Oakland Inc.*, 7 Cal.3d 94, 101 Cal.Rptr. 744 (1972). It includes all wrongful business conduct in whatever context such activity may occur. *People v. McKale*, 25 Cal.3d 626, 159 Cal.Rptr. 811 (1979). If plaintiffs show that defendant violates a federal or state statute as a business practice, plaintiffs prove an unlawful practice under Sections 17200 et seq. *Peterson v. Wells Fargo Bank*, 556 F.Supp. 1100, 1104-1105 (N.D.Cal. 1981). *See also, Kelley Blue Book v. Car-Smarts, Inc.*, 802 F.Supp. 278, 288-289 (C.D.Cal. 1992). Debt collection practices that violate the FDCPA are unlawful business practices. *Newman v. Checkrite*, 912 F.Supp. at 1375 n.31.

Injunctive relief is available under Bus. & Prof. Code §§ 17203 and 17204 for violations of the FDCPA of the type alleged in this action, *Newman v. Checkrite*, 912 F.Supp. at 1375. Under section 17203, the Court has the discretion to order class certification. *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 454, 153 Cal.Rptr. 28 (1979).



1 **C. California’s Check Diversion Statute, Penal Code §§1001.60 et seq.**

2 Defendants identify Penal Code §§ 1001.60, *et seq.*, the Bad Check Diversion Act  
 3 [“BCDA”], as authority for the restitution program they operate, including the fees they charge  
 4 and the demands they make. To deal with the problem of *criminal* bad check writing the  
 5 California Legislature authorized the creation of a bad check diversion program within each  
 6 county’s district attorney’s office, but only “[u]pon the adoption or a resolution by the board of  
 7 supervisors declaring that *there are sufficient funds available to fund the program.*” Penal Code  
 8 § 1001.60. The bad check diversion programs apply only to persons who write bad checks  
 9 within the meaning of Section 476a—that is those persons having the required specific intent to  
 10 defraud the merchant at the time the check is written. *Id.*

11 To protect check writers from being referred to criminal diversion erroneously, the  
 12 California the Legislature has enacted safeguards. The Bad Check Diversion Act sets forth clear  
 13 statutory prerequisites. On receipt of a bad check case the district attorney has the sole authority  
 14 to refer the case to a diversion program, after he or she determines that “the case is one which is  
 15 appropriate to be referred to the bad check diversion program.” Penal Code §§ 1001.61 and  
 16 1001.62. Section 1001.60 defines “writing a bad check” as writing a check where “there is  
 17 probable cause to believe there has been a violation of Section 476a. If probable cause exists, to  
 18 determine whether the case is appropriate for referral to a bad check diversion program, “the  
 19 district attorney *shall consider*” the criteria set forth in Penal Code § 1001.62. This criteria  
 20 includes, but is not limited to: (a) The amount of the bad check; (b) any prior criminal record or  
 21 previous diversion; (c) the number of bad check grievances against the person previously  
 22 received by the district attorney; (d) whether there are other bad check grievances currently  
 23 pending against the person; and, (e) the strength of the evidence, if any, of intent to defraud the  
 24 victim.

25 For a check writer to successfully avoid prosecution for criminal bad check writing,  
 26 satisfaction of two conditions is mandatory: (1) the check writer must complete a class or  
 27 classes—to wit, the diversion program—conducted either by the district attorney *or a private*  
 28 *entity under contract with the district attorney*; and (2) the check writer must make full



1 restitution to the victim. Penal Code §§ 1001.64(a) and (b); *emphasis added*. The district  
 2 attorney may also require the check writer to pay a collection fee of \$35 and a bank fee in the  
 3 amount *actually incurred* by the merchant of up to a maximum of \$10. *Id.*, §§ 1001.64(c),  
 4 1001.65(a) and (c). These are the only fees permitted, unless a check writer has been convicted  
 5 of violating Penal Code § 476a. Penal Code §1001.65(a).

## 6 THE PROPOSED CLASSES

7 In this motion plaintiffs seek an order certifying one umbrella class and two subclasses of  
 8 consumers for the claims for relief under the FDCPA and state tort claims. Named plaintiffs  
 9 Elena del Campo, Ashorina Medina, Lisa Johnston and Lois Artz would each serve as a class  
 10 representative for the umbrella class and each subclass. The proposed classes are defined as:

11 **Umbrella class:** All persons to whom ACCS mailed at least one demand letter  
 12 purporting to be from a district attorney's office in California, attempting to collect a dishonored  
 13 check, which was not returned as undeliverable.

14 Sub-class 1: [FDCPA class]: All members of the umbrella class, from whom ACCS after  
 15 December 11, 2000 attempted to collect, or collected money for a check written for personal,  
 16 family, or household purposes,.

17 Sub-class 2: [CUBPA class]: All members of the umbrella class from whom ACCS  
 18 attempted to collect, or collected money, after December 11, 1997.

19 Sub-class 3: [Misrepresentation class]: All members of the umbrella class from whom  
 20 ACCS collected money after December 11, 1999.

21 Sub-class 4: [Bank records class]: All members of the umbrella class whose bank records  
 22 ACCS obtained after December 11, 1999.

## 23 ARGUMENT

### 24 I. THE PROPOSED CLASS MEETS THE REQUIREMENTS FOR CERTIFICATION

#### 25 A. Standards for Class Certification

26 Congress has expressly recognized the propriety of a class action under the FDCPA by  
 27 providing special damage provisions and criteria in 15 U.S.C. §§ 1692k(a) and (b) for FDCPA  
 28 class action cases. For a class to be certified, plaintiffs must satisfy all four requirements of

Fed.R.Civ.P., Rule 23(a), and at least one of the three categories of Fed.R.Civ.P., Rule 23(b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Mantoliet v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985). Each subclass must also satisfy these same requirements. *Betts v. Reliance Collection Agency*, 659 F.2d 1000, 1005 (9th Cir. 1981).

As discussed in the introduction, *supra*, courts have granted class certification in four cases that are substantially similar to the instant case. *See Liles v. American Corrective Counseling Services, Inc.*, 231 F.R.D. 565; *Hamilton v. Am. Corrective Counseling Serv.*, 2007 U.S. Dist. LEXIS 11488, *Schwarm v. Craighead*, 233 F.R.D. 655. *Gradisher v. Check Enforcement Unit, Inc.*, 203 F.R.D. 271 (W.D. Mich. 2001). Those cases are directly on point to the present case. Here each class or subclass also meets all the requirements of Rule 23(a). The umbrella class and subclasses may be certified under either Rule 23(b)(2) or Rule 23(b)(3).

#### **B. Plaintiffs Satisfy the Requirements Set Forth in Rule 23(a)**

Fed.R.Civ.P., Rule 23(a) provides that a member of a class may sue as a representative party if: (1) the class is so numerous that the joinder of all members of the class is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

##### **1. Each Class or Subclass Is so Numerous that Joinder of all Parties Is Impracticable**

Fed.R.Civ.P., Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." *Gay v. Waiters and Dairy Lunchmen's Union*, 549 F.2d. 1330 (9th Cir. 1977); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D.Cal. 2003). Impracticability of joinder is determined not according to a strict numerical test, but upon the circumstances surrounding each case. *General Tel. Co. v. EEOC*, 446 U.S. 318, 330, 64 L.Ed.2d 319, 100 S.Ct. 1698 (1980). One court has stated that "in light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule

23(a)(1) on that fact alone." *Amone v. Aveiro*, 226 F.R.D. 677, 684 (D.Haw. 2005), citing Newberg and Conte, 1 *Newburg on Class Actions* § 3.6 (4th ed. 2002).

In the present case, the information provided by ACCS shows, during the time period encompassed by this lawsuit, that it has mailed dunning letters on more than 900,000 checks written in California. ACCS Response to Interrogatory No. 31, Exhibit 17. Subclass one, the FDCPA class, includes 667,574 of these checks, since the statute of limitations for FDCPA claims includes checks from December 12, 2000 forward. *Id.* All of the checks are encompassed within the time frame of subclass two, the CUBPA class, since the statute of limitations runs back to December 12, 1997. The tort classes encompass 760,352 checks, since these claims run back to December 12, 1999. *Id.* As a standard practice ACCS pulled bank records on all check writers whose checks meet the eligibility criteria for prosecution and the check writer has not resolved the matter through ACCS' program. Exhibit 18, ACCS Operational Flow Chart, and Exhibit 17, ACCS Response to Interrogatory No. 19.

While the exact size of the bank records subclass is not known at this date, ACCS' electronic records include this information. Moreover, the court may make common sense assumptions to find support for numerosity. *Evans v. United States Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983). *See also* 3 *Newberg on Class Actions* §7.22, "[w]here the exact size of the class is unknown, but it is general knowledge or common sense that it is large, the court may assume joinder is impracticable." Based on sheer numbers alone the umbrella class and subclasses satisfy the numerosity requirement of Rule 23(a)(1).

## **2. There Are Questions of Law and Fact Common to the Class and Subclasses**

Fed.R.Civ.P., Rule 23(a)(2) requires that there be a common question of law or fact. The Ninth Circuit construes commonality liberally. *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality is satisfied when there are underlying facts or legal theories common throughout the class, even if the common facts support different legal theories or common legal theories rest on different facts. Not all factual or legal questions raised in the litigation need be common so long as at least one issue is common to all class members. *Id.* "A sufficient nexus is established if the claims or defenses of the class and the class representatives

1 arise from the same event or pattern or practice and are based on the same legal theory."

2 *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

3 Common questions of law and fact arise where defendants have engaged in standardized  
4 conduct towards members of the proposed class by mailing them form demand letters that  
5 contain the alleged violations. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 544-547  
6 (N.D.Cal. 2005). Commonality typically manifests "where... the defendants have engaged in  
7 standardized conduct towards members of the proposed class by mailing to them allegedly illegal  
8 form letters." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). *See also Irwin v. Mascott*, 96  
9 F.Supp.2d 968, 982 (N.D.Cal. 1999), certification granted of a class consisting of those persons  
10 to whom defendants had sent dunning letters containing the same or similar demands as those  
11 sent to the class representatives. *Id.*, at 982; *Ballard v. Equifax Check Servs.*, 186 F.R.D. 589,  
12 595 (E.D.Cal. 1999), commonality requirement met where defendant had sent class members  
13 "standardized collection letters."

14 In *Schwarm v. Craighead*, 233 F.R.D. 655, 661, which is indistinguishable from the  
15 instant case, where the debt collector mailed standardized demand letters on district attorney  
16 letterhead, allegedly pursuant to Penal Code §§ 1001.60 et seq., the court ruled that there were  
17 "common questions of both law and fact." "Because defendants have engaged in standardized  
18 practices of sending form letters to putative class members regarding dishonored checks, there is  
19 a common factual basis for all class members." *Id.* Further, the court held that plaintiff's legal  
20 claims arise from this common set of facts. The court rejected defendants' argument that  
21 commonality did not exist because "different letters were sent in different counties and the oral  
22 communications between [defendant] and check writers are not uniform," stating that "[t]his  
23 argument . . . is nothing more than an allegation of "divergent factual predicates," which does not  
24 defeat commonality. *See Hanlon*, 150 F.3d at 1019."<sup>8</sup> Here, as in *Schwarm*, there are common

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25  
26 8. Other courts have recognized that the legal issues arising from a debt collectors' standard  
27 collection practices are the same for each class member. *See e.g., Bracamonte v. Eskanos & Adler*,  
28 2004 U.S. Dist. LEXIS 8520 at \*14-\*15 (N.D.Cal. 2004); *Littledove v. JBC & Assocs.*, 2001 U.S.  
Dist. LEXIS 139 at \*16.

1 questions of both law and fact based on defendants' standardized practice of sending form  
2 collection letters.

3 In this case the Court has ruled already on a number of the parties' common legal issues.  
4 These include: (1) "Plaintiffs' obligations to honor checks written to pay for "personal, family,  
5 or household purposes" qualify as "debt" within the definition of § 1692(a)(5)." *Del Campo v.*  
6 *Kennedy*, 491 F.Supp.2d 891, 903 (N.D.Cal. 2006). (2) "ACCS is a private actor attempting to  
7 take action to collect a debt against private individuals in order to compensate third party  
8 creditors, and thus, is bound by the requirements of the FDCPA." *Id.* (3) "ACCS is a private  
9 organization with a government contract; it is not a government agency or employee. The  
10 provisions of the FDCPA are extremely broad, and there is no exemption for a private actor due  
11 to the existence of a contract with a local government, regardless of its underlying purpose or  
12 motive." *Id.* (4) "[U]nder the plain language of the FDCPA, an individual can be considered a  
13 "debt collector" and be held personally liable without piercing the corporate veil for those acts if  
14 the individual materially participated in the debt collection activities." *Id.* (5) "[T]he question of  
15 [an individual debt collector's] liability turns on whether the Individual Defendants' activities  
16 were sufficient to be considered "material participation." *Id.* at 904. (6) "Whether ACCS is  
17 liable under the FDCPA will be determined based on the representations in its form letters, not  
18 any other particular check writer's fraudulent intent when writing a check." *Del Campo v.*  
19 *Kennedy*, 2007 U.S. Dist. LEXIS 12387, \*8 (February 8, 2007). (7) "Under the FDCPA, a debt  
20 collector may not, inter alia, threaten to take any action that cannot legally be taken or is not  
21 intended to be taken. 15 U.S.C. § 1692e(5). A defendant violates this subsection by rarely, or  
22 never, following through on its threats to sue; threats to sue must be accompanied by a  
23 particularized intention to sue a given debtor if he or she does not pay. *U.S. v. Nat'l Fin. Servs.*,  
24 *98 F.3d 131, 137-39 (4th Cir. 1996).*" *Id.* at \*9. (8) The issues relevant to the FDCPA  
25 determination are (1) the debt collector's knowledge of whether recipients could be prosecuted *at*  
26 *the time the letters were sent* and (2) the debt collector's intent to take legal action at that time.  
27 Whether or not a particular individual could have been prosecuted, based on their notice of the  
28 bad checks or the amount of time they had to make good on the debt before being contacted by

1 ACCS, is not relevant to the FDCPA issues in this case. *Id.* (9) “The federal courts determine  
2 whether a party is subject to FDCPA requirements by analyzing the party's collection activity  
3 rather than the conduct or recidivism rate of a particular check writer. *See, e.g. Gradisher v.*  
4 *Check Enforcement Unit*, 133 F.Supp.2d 988, 990-91 (W.D. Mich. 2001), *Liles v. Am.*  
5 *Corrective Counseling Servs.*, 131 F.Supp.2d 1114, 1118-19 (S.D. Iowa 2001).” *Id.*, at \*9-\*10.  
6 (10) A plaintiff’s check writing practices are not relevant to whether ACCS is exempt from  
7 complying with the FDCPA. *Id.*, at \*11. (11) “As a private actor, attempting to take action  
8 against Plaintiff, a private individual, in order to compensate a private third-party creditor,  
9 partially or completely, for a private debt owed by Plaintiff to that third-party, ACCS is bound by  
10 the requirements of the FDCPA . . . Although the FDCPA exempts from its requirements officers  
11 and employees of state governments, ACCS is a private organization with a government  
12 contract; it is not a government agency or employee. The existence of a contract with a local  
13 government, regardless of its underlying purpose or motive, cannot exempt a private actor from  
14 the provisions and requirements of the FDCPA. *Order Granting in Part and Denying in Part*  
15 *Defendants' Motion to Dismiss* at 5-6, Docket Item No. 23.

16 ACCS’ initial letter to plaintiffs and all putative class members is entitled “Official  
17 Notice” and is printed on district attorney letterhead. The “Official Notice” includes a threat of  
18 criminal prosecution, a demand for a \$35.00 “Admin Fee”, a “Program Fee” ranging from  
19 \$100.00 to \$165.00, and a “Returned Item Fee” of \$10.00. Each “Official Notice” fails to inform  
20 plaintiffs and putative class members that it is from a debt collector, and fails to advise putative  
21 class members of their rights under the FDCPA, 15 U.S.C. §§1692e and g. Thus, the first form  
22 letter includes all of the elements of the claims against defendants. The second and third  
23 demands that ACCS mails if the check writer fails to pay, seek payment of all unpaid amounts  
24 that ACCS has demanded and threatens criminal charges if its demands are not met. In addition,  
25 if a putative class member wishes to make payments, ACCS charges a \$25.00 scheduling fee. If  
26 a putative class member pays late, ACCS charges a \$10.00 late fee.

27 ACCS mailed everyone in the Umbrella Class an “Official Notice,” and mailed hundreds  
28 of thousands of check writers two or more demand letters. Because defendants have engaged in

1 the standardized practice of sending form letters to putative class members regarding dishonored  
2 checks, there is a common factual basis for all class members. In addition as in *Schwarm*,  
3 plaintiffs' legal claims arise from this common set of facts. Plaintiffs claim that defendants  
4 negligently and fraudulently misrepresented information in their communications regarding: (1)  
5 the fact that the communications were not from a law enforcement agency; (2) the character,  
6 amount, and legal status of the debt; (3) defendants' failure to provide statutorily required  
7 language on their dunning notices; and (4) the fact that defendants could not themselves  
8 prosecute putative plaintiffs for failure to respond. Other legal questions common to the putative  
9 plaintiffs are plaintiffs' claims that defendants sent letters and attempted to collect upon the debt,  
10 without a probable cause determination or a referral by the DA, and defendants invaded class  
11 members' privacy rights by requesting and obtaining their bank records.

12 Further, defendants have asserted a common defense that they are not subject to the  
13 FDCPA and that they are authorized to engage in their standardized practices by the BCDA and  
14 their contracts with California district attorneys.

15 While there are individual questions of law and fact involving damages, the common  
16 questions of law and fact arising from defendants' form dunning letters predominate over any  
17 questions affecting only individual class members. *Schwarm v. Craighead*, 233 F.R.D. at 661.  
18 Since all claims arise from ACCS' uniform collection practices, plaintiffs have satisfied the  
19 commonality requirement of Rule 23(a)(2).

### 20 **3. Plaintiffs' Claims Are Typical of the Claims of the Class**

21 Fed.R.Civ.P., Rule 23(a)(3) requires that the claims of the named plaintiffs be typical of  
22 the claims of the class. The typicality requirement ensures that the named plaintiffs' claims and  
23 the class claims are so interrelated that the interests of the class members will be fairly and  
24 adequately protected in their absence." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156, 102 S. Ct.  
25 2364, 72 L. Ed. 2d 740 (1982). The purpose of typicality is to "assure that the interest of the  
26 named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976  
27 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class  
28 representative, and not to the specific facts from which it arose or the relief sought."



1 A plaintiff's claim is typical if it arises from the same event or practice or course  
 2 of conduct that gives rise to the claims of other class members and his or her  
 3 claims are based on the same legal theory. The typicality requirement may be  
 4 satisfied even if there are factual distinctions between the claims of the named  
 plaintiffs and those of other class members. Thus, similarity of legal theory may  
 control even in the face of differences of fact.

5 *Armstrong v. Davis*, 275 F.3d at 869. *See also, Keele v. Wexler*, 149 F.3d at 595; *Abels v. JBC*  
 6 *Legal Group, P.C.*, 227 F.R.D at 545.

7 In the instant case, defendants sent named plaintiffs the same or substantially similar  
 8 form letters that defendants sent to the class as a whole. All letters are printed on district  
 9 attorney letterhead. All letters demand the same categories of fees from each named plaintiff and  
 10 each putative class member and threaten criminal proceedings if the amounts are not paid. None  
 11 of defendants' dunning letters warn that they are from a debt collector or provide the advisement  
 12 of rights required by 15 U.S.C. §1692g.

13 Consequently, all putative class members have the same or similar injury arising from the  
 14 use of district attorney letterhead, charging the same allegedly unlawful fees, making the same  
 15 threats and failing to provide the same FDCPA statutorily required language. Finally, it is  
 16 through this same course of conduct that the alleged injuries arose. Since plaintiffs' claims are  
 17 reasonably coextensive with those of the class, plaintiffs satisfy the typicality requirement of  
 18 Rule 23(a)(3).

#### 19 **4. Named Plaintiffs and Class Counsel Will Fairly and Adequately Represent the** 20 **Interests of the Class and Subclasses**

21 The fourth and final Rule 23(a) requirement — adequacy — requires: (1) that the  
 22 proposed representatives do not have conflicts of interest with the proposed class; and (2) that  
 23 plaintiffs are represented by qualified counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d at 1020. The  
 24 adequacy of representation requirement serves two functions. Like the commonality and  
 25 typicality requirements, it assures that shared interests between the representative plaintiffs and  
 26 the class as a whole are present, but it also functions to ensure the absence of conflicts. *Amchem*  
 27 *Products, Inc. v. Windsor*, 521 U.S. at 625-26. To serve as representatives, the named plaintiffs  
 28 must have common interests with class members and a lack of interests adverse to class



1 members. They must also vigorously prosecute the interests of the class through qualified  
 2 counsel. *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403-405, 52 L.Ed.2d  
 3 453, 97 S.Ct. 1891 (1977). This standard requires similarity, not identity, of interests. It does  
 4 not preclude some unique interests; it only precludes adverse interests. Rule 23(a)(4) also  
 5 requires that the named plaintiffs provide fair and adequate protection for the interests of the  
 6 class.

7 Named plaintiffs are qualified as class representatives. Their declarations establish that  
 8 they have a basic understanding of the basis for the lawsuit and their obligations as class  
 9 representatives.<sup>9</sup> The claims of the representative plaintiffs are the same as the claims of the  
 10 class, arising out of the same form letters sent to the class. They are seeking all available relief,  
 11 including declaratory and injunctive relief, and actual and statutory damages. Given the identical  
 12 nature of the claims between the representative plaintiffs and the class members, there is no  
 13 potential for conflicting interests in this action. *See, Abels v. JBC Legal Group, P.C.*, 227 F.R.D  
 14 at 545.

15 Plaintiffs are represented by experienced counsel, Paul Arons and Sharon Grace, Law  
 16 Offices of Paul Arons, O. Randolph Bragg, Horwitz & Horwitz & Associates; Deepak Gupta,  
 17 Public Citizen Litigation Group; Lester A. Perry, Hoole & King; and Ronald Wilcox, Law Office  
 18 of Ronald Wilcox.<sup>10</sup> These counsel have been recognized in other courts as experienced  
 19 litigation attorneys qualified as class counsel. *Hamilton v. American Corrective Counseling*  
 20 *Serv.*, 2007 U.S. Dist. LEXIS 11488; *Irwin v. Mascott*, 96 F. Supp. 2d at 983; *Swanson v. Mid*  
 21 *Am, Inc.*, 186 F.R.D. 665, 668 (M.D. Fla. 1999); *Newman v. CheckRite*, 912 F.Supp. 1354  
 22 (E.D.Cal. 1995); *Ditty v. CheckRite* 182 F.R.D. 639, 642 (D. Utah 1998); *Borcherdine-Dittloff v.*  
 23 \_\_\_\_\_

24 9. *See* Declarations of Elena del Campo, Ashorina Medina, Lisa Johnston, and Lois Artz  
 25 supporting this motion, filed herewith. Plaintiffs' counsel is moving to withdraw from  
 26 representing plaintiff Miriam Campos, with whom they have lost contact. She will remain a  
 member of the class, if the motion is granted.

27 10. *See* Declarations of Paul Arons, Sharon Grace, O. Randolph Bragg, Deepak Gupta.  
 28 Lester Perry and Ronald Wilcox, filed in support of this motion.

1 *Transworld Systems, Inc.*, 185 F.R.D. 558, 563-64 (W.D. Wis. 1999); *Abels v. JBC Legal Group*,  
 2 *P.C.*, 227 F.R.D. 541; *Hunt v. Check Recovery Services*, 241 F.R.D. 505 (N.D.Cal. 2007);  
 3 *Littledove v. JBC & Assocs.*, 2001 U.S. Dist. LEXIS 139, \*12 (E.D.Cal. Jan. 11, 2001). Hence,  
 4 all counsel have demonstrated that they are qualified, experienced and generally able to conduct  
 5 the proposed litigation. They should therefore be appointed as class counsel. Thus, named  
 6 plaintiffs satisfy the requirements of Rule 23(a)(4) through their own adequacy and through the  
 7 adequacy of their counsel.

8 **II. PLAINTIFFS REQUEST THE COURT TO CERTIFY A HYBRID CLASS**  
 9 **ACTION, WITH THE ISSUES OF INJUNCTIVE AND DECLARATORY**  
 10 **RELIEF, LIABILITY AND STATUTORY DAMAGES CERTIFIED**  
 11 **PURSUANT TO RULE 23(b)(2), AND ACTUAL DAMAGES CERTIFIED**  
 12 **PURSUANT TO RULE 23(b)(3)**

13 **A. The Issues of Injunctive and Declaratory Relief, Liability and Statutory**  
 14 **Damages May Be Certified under Rule 23(b)(2)**

15 An action may be maintained as a class action under Rule 23(b)(2) if:

16 the party opposing the class has acted or refused to act on grounds generally  
 17 applicable to the class, thereby making appropriate final injunctive relief or  
 18 corresponding declaratory relief with respect to the class as a whole. . . .

19 The archetypal case for Rule 23(b)(2) certification is one where policies applicable to a  
 20 large number of persons are challenged as unlawful. Certification under Rule 23(b)(2) is  
 21 appropriate where declaratory or injunctive relief is predominant, and monetary damages are  
 22 incidental. Rule 23(b)(2) certification is appropriate even in actions where plaintiffs' claim for  
 23 declaratory and injunctive relief is accompanied by damages or retroactive relief claims. *Molski*  
*v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); *Probe v. State Teachers' Retirement System*, 780  
 24 F.2d 776, 780 (9th Cir. 1986); *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439  
 25 (N.D. Cal. 1994).

26 In *Probe*, the court certified a class under Rule 23(b)(2), where male plaintiffs sought  
 27 injunctive and declaratory relief concerning a retirement plan's use of sex-based mortality tables  
 28 in calculating the benefits due under the plan, even though plaintiffs also sought individual  
 damages and retroactive monetary relief. In *Arnold v. United Artists Theater Circuit, Inc.*, 158  
 F.R.D. 439, plaintiffs alleged that United Artists theaters failed to make their theaters accessible

1 to handicapped individuals, in violation of federal and state civil rights laws. The court certified  
 2 a class action under Rule 23(b)(2), even though plaintiffs sought individual damages for class  
 3 members. The court reasoned that “the cohesiveness of the class and the homogeneity of the  
 4 members' interests [are] the salient factors on which the availability of the (b)(2) class action  
 5 form hinges. . . .” Since calculation of damages did not involve “a complicated, individual-  
 6 specific calculus,” certification under Rule 23(b)(2) was proper.<sup>11</sup> *Id.* 451-453.

7 Indeed, some courts take the view that if the Rule 23(a) prerequisites have been met and  
 8 injunctive relief has been requested, the action should be allowed to proceed under subdivision  
 9 (b)(2). Wright, Miller & Kane, 7AA *Federal Practice and Procedure* § 1784.1, at 348 (3d ed.  
 10 2005). Courts have followed this approach in FDCPA cases.

11 In addition, this case meets the requirements for issuing a declaratory judgment. The  
 12 principal criteria guiding the policy in favor of rendering declaratory judgments are: (1) when  
 13 the judgment will serve a useful purpose in clarifying and settling of legal relations between the  
 14 parties; and (2) when it will terminate and afford relief from the uncertainty, insecurity, and  
 15 controversy giving rise to the proceeding. *Gammon v. G.C. Services Ltd. Partnership*, 162  
 16 F.R.D. at 320. *See also Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986); W. Schwarzer,  
 17 *Federal Civil Procedure Before Trial*, § 10:5 (2006). In the instant case, a declaratory judgment  
 18 would settle the issue of the legality of defendants’ behavior with respect to the entire class.  
 19 Given that the very purpose of class actions is to promote judicial efficiency and economy, the  
 20 Court finds that Plaintiff’s request for declaratory judgment to be appropriate. *See Gen. Tel. Co.*  
 21 *v. Falcon*, 457 U.S. at 149.

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22  
 23  
 24 11. In *Arnold*, the court granted class certification on the issue of damages arising from  
 25 actual theater visits, because that damages issue could be resolved by proof of the inadequate  
 26 access in particular movie theaters in defendant’s movie theater chain, and the amount of  
 27 damages could be calculated based on evidence of the number of visits that each plaintiff had  
 28 made to a theater with inadequate access. The court did not certify for class treatment damages  
 arising from the claim that inadequate disabled access deterred visits to the movie theater,  
 because proof of “deterrence” damages would have required the resolution of individual-specific  
 issues, which would substantially increase the complexity of the case. 158 F.R.D. at 453.

1 A hybrid class action is appropriate where a broad class is entitled to a declaratory  
2 judgment or injunctive relief, and a narrower class is entitled to monetary damages. In fact,  
3 district courts in the Ninth Circuit have not hesitated to certify hybrid class actions in cases like  
4 this, where plaintiffs seek class-wide injunctive relief, declaratory relief and monetary damages  
5 where defendants' alleged unlawful collection practices are based on form letters. This Court  
6 certified a hybrid debt collection action based on form letters in *Abels v. JBC Legal Group P.C.*,  
7 227 F.R.D. at 544-547. *See also, Schwarm v. Craighead*, 233 F.R.D. at 663, certifying the issues  
8 of liability, injunctive and declaratory relief and statutory damages under Rule 23(b)(2); *Hunt v.*  
9 *Check Recovery Services*, 241 F.R.D. at 513, 515, granting Rule 23(b)(2) certification on the  
10 issues of liability, declaratory relief, and statutory damages under the FDCPA, and limiting  
11 certification under Rule 23(b)(3) to actual damages; *Ballard v. Equifax Check Servs.*, 186 F.R.D.  
12 at 596; certifying the FDCPA class under Rule 23(b)(2) on the issues of liability, declaratory  
13 relief, and statutory damages but reserving certification of actual damages for certification under  
14 Rule 23(b)(3); *Littledove v. JBC & Assocs.*, 2001 U.S. Dist. LEXIS 139, \*14-\*17, same; *Irwin v.*  
15 *Mascott*, 96 F.Supp.2d at 981-982, same.

16 Like the cases cited above, defendants in the present case have acted or refused to act on  
17 grounds generally applicable to the class, thereby making final injunctive relief or corresponding  
18 declaratory relief appropriate with respect to the class as a whole. The declaratory relief sought  
19 in this action would declare, among other things, that defendants' collection practices of mailing  
20 letters on district attorney letterhead; relying on a criminal diversion statute without a finding of  
21 probable cause and failing to follow the mandatory statutory requirements of the BCDA;  
22 threatening criminal proceedings; requesting check writer's bank records; and demanding an  
23 "Admin Fee," a "Program Fee" and a "Returned Item Fee" violate the FDCPA and constitute  
24 unlawful business practices. Injunctive relief would prohibit defendants from continuing the  
25 enumerated unlawful practices. This relief, if granted, will affect far more people and have far  
26 greater consequences over a longer period of time than monetary damages, since it will protect  
27 class members who have not paid all of defendants' demands, and the relief would operate  
28

prospectively to protect check writers who otherwise may have been subject to defendants' practices.

The hybrid suit may be tried in two stages. In the first stage, the court determines whether defendants are liable to the class and subclasses, and determines whether declaratory and injunctive relief should be granted. In this case, a determination would be made as to whether defendants' collection practices violate the FDCPA or state constitutional prohibition against invasion of privacy, or whether defendants' made fraudulent or negligent misrepresentations to class members. If violations are found, the Court would proceed to stage two to determine actual damages, if defendants' refuse to stipulate to actual damages based on their computerized records. All class members entitled to actual damages pursuant to the Court's liability rulings would be part of the Rule 23(b)(3) class. These class members would be allowed the opportunity to either opt out of the proceedings, so that they could pursue relief in their own private right of action, or could proceed to a determination of their actual damages. *Simon v. World Omni Leasing*, 146 F.R.D. 197, 202-203 (S.D.Ala. 1992).

## **B. Plaintiffs Meet the Requirements for Rule 23(b)(3) Certification Limited to Class Members Who Have Actual Damages**

### **1. Common Questions of Law or Fact Predominate**

Fed.R.Civ.P., Rule 23(b)(3) provides that class certification is appropriate where the court finds that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In this action, common issues of law and fact predominate over individual issues. "Predominance is a test readily met in certain cases alleging consumer .... fraud. . " *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591 at 624. In FDCPA actions, a common nucleus of operative fact is typically found where "defendants have engaged in standardized conduct toward members of the proposed class by mailing to them allegedly illegal form letters or documents." In *Liles v. American Corrective Counseling Services, Inc.*, 231 F.R.D. at 575, the district court found the predominance requirement satisfied, stating:

1 The primary disputed issues are whether defendants' communications with  
 2 plaintiffs were improper under the FDCPA; and if so, the appropriate remedies.  
 3 The first of these issues is common to all class members, as are the statutory  
 4 damages to which each class member is entitled. Although *actual* damages must  
 be determined on an individual basis, this fact does not override the  
 overwhelming predominance of common issues.

5 “The significant issue of whether the collection letters violate the FDCPA outweighs the  
 6 individualized damages issues.” *Hamilton v. American Corrective Counseling Serv.*, 2007 U.S.  
 7 Dist. LEXIS 11488 at \*16-\*17, citing *Liles*. As in *Liles* and *Hamilton*, the present case is based  
 8 on the legality of defendants’ collection conduct, as reflected in the representations and demands  
 9 in ACCS’ dunning letters. The only individual issues are ministerial, *e.g.*, identifying and  
 10 locating class members, and calculating damages, which can all be resolved by reviewing  
 11 defendants’ computerized collection records. In this case, it is clear that the class' factual and  
 12 legal issues, as well as the issues of law, predominate over any individual questions.

## 13 **2. A Class Action Is Superior to other Available Methods to Resolve this** 14 **Controversy**

15 To determine if a class action is superior, a court will balance the merits of a class action  
 16 against alternative methods of adjudication, in terms of fairness and efficiency. The Court is  
 17 required to determine the best available method for resolving the controversy and must "consider  
 18 the interests of the individual members in controlling their own litigation, the desirability of  
 19 concentrating the litigation in the particular form, and the manageability of the class action."  
 20 *Ballard v. Equifax Check Servs.*, 186 F.R.D. at 600. In deciding the "best" available method, a  
 21 court may properly consider the “...inability of the poor or uninformed to enforce their rights,  
 22 and the improbability that large numbers of class members would possess the initiative to litigate  
 23 individually.” *Haynes v. Logan Furniture Mart. Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974).

24 A class action is also superior to the litigation of the putative members' individual claims.  
 25 Not only are most individual consumers unaware of their rights under the FDCPA, but also the  
 26 size of the individual claims is "usually so small there is little incentive to sue individually."  
 27 *Schwarm*, 233 F.R.D. at 664, *citing Ballard*, 186 F.R.D. at 600 (“[c]lass action certifications to  
 28 enforce compliance with consumer protection laws are desirable and should be encouraged.”)

1 As in *Schwarm* and *Ballard*, certification of the present action is the superior method to resolve  
2 the controversy presented here.

3 **CONCLUSION**

4 The proposed umbrella class and subclasses each meet all of the requirements of  
5 Fed.R.Civ.P., Rule 23(a), as well as the requirements of Fed.R.Civ.P., Rule 23(b)(2)and (b)(3).  
6 Plaintiffs request the Court to certify the issues of liability, declaratory and injunctive relief and  
7 statutory damages under Rule 23(b)(2), and the issue of actual damages under Rule 23(b)(3).  
8 Plaintiffs Elena del Campo, Ashorina Medina, Lisa Johnston, and Lois Artz request that the  
9 Court appoint each of them to represent the umbrella class and subclasses one through four.  
10 Plaintiffs also request the Court to appoint Paul Arons, Sharon Grace, Deepak Gupta, Rand  
11 Bragg, Lester Perry and Ronald Wilcox as class counsel.

12 Dated: June 2, 2008

Respectfully submitted,

13 LAW OFFICES OF PAUL ARONS

14  
15 By s/Paul Arons  
16 Paul Arons  
Attorneys for Named Plaintiffs



Additional Plaintiff's Counsel:

Deepak Gupta, D.C. Bar #495451  
(*pro hac vice*)  
PUBLIC CITIZEN LITIGATION GROUP  
1600 20th Street, NW  
Washington, DC 20009  
Tel: (202) 588-1000  
Fax: (202) 588-7795  
dgupta@citizen.org

O. Randolph Bragg, IL. Bar #06221983  
HORWITZ, HORWITZ & ASSOCIATES  
25 East Washington, Suite 900  
Chicago, IL 60602  
Tel: (312) 372-8822  
Fax: (312) 372-1673  
rand@horwitzlaw.com

Ronald Wilcox, State Bar #176601  
LAW OFFICE OF RONALD WILCOX  
2160 The Alameda, 1<sup>st</sup> Flr., Suite F  
San Jose, CA 95126  
Tel: (408) 296-0400  
Fax: (408) 296-0486

Lester A. Perry (2571)  
Hoole & King  
4276 South Highland Drive  
Salt Lake City, Utah 84124  
Telephone: (801) 272-7556  
Fax: (801) 272-7557  
E-mail: [lap@hooleking.com](mailto:lap@hooleking.com)